KUCHINTA AUTO SDN BHD

v.

CIMB BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD JC
[CIVIL ACTION NO: S3-22-1059-2008]
12 NOVEMBER 2013

BANKING: *Banker and customer - Contractual relationship - Delay in clearance of cheques and dishonouring of cheques - Whether delay explained - Whether there was involvement of other parties - Special relationship between banker and customer - Whether bank breached contractual obligation towards customer - Whether breach of duty of care towards customer*

TORT: *Negligence - Duty of care - Banker and customer - Whether special relationship existed between banker and customer - Whether gave rise to duty of care - Failing to clear cheques within reasonable timeline - Whether bank failed to exercise due care in ensuring services provided to customer were satisfactory*

TORT: *Defamation - Libel - Bank dishonouring of customer's cheques with notation of 'refer to drawer' - Whether caused embarrassment to customer - Whether lowered customer's standing in eyes of recipient of cheques - Whether plaintiff had made out case premised on tort of defamation*

The plaintiff, Kuchinta Auto Sdn Bhd ('Kuchinta'), was a car dealer for Proton Edar since 1997. Around the same time, Kuchinta had opened an account with CIMB Bank Berhad ('CIMB') ('the subject account') for the purpose of its business. Between 12 June 2008 to 18 June 2008, Kuchinta had deposited into the subject account, Bankers Cheques ('the cheques') related to proceeds Kuchinta received from its end-financiers from the sale of Proton cars bought by the hirers from Kuchinta. However, it was discovered that three of Kuchinta's cheques which were deposited in the subject account had not been cleared for payment. Subsequently, Kuchinta realised it not only had problems with non-clearance of the deposited cheques but also discovered that seven of its CIMB's cheques under the subject account which it had issued to its creditors for the purpose of its

business and/or to its staff had not been honoured by CIMB. According to Kuchinta, around the time the seven cheques were issued, the subject account would have sufficient funds in it if CIMB had not breached its obligation under the contract by acting within the timeline set by its Standard Operating Procedure (SOP) and/or by the banking industry and/or if CIMB had not breached its duty of care it owed to Kuchinta as its corporate customer. In addition to that, Kuchinta further alleged that by the publication of "01-Refer to Drawer" on the "Return Cheque Advice", CIMB had defamed Kuchinta and/or had lowered the estimation of Kuchinta in the eyes of the recipient of the said cheque. Kuchinta therefore claimed against CIMB for damages arising from the delay in clearing the four cheques deposited by Kuchinta into the subject account with CIMB and the failure of CIMB to honour seven of Kuchinta's CIMB cheques issued by Kuchinta for payments to its creditors and/or staff. CIMB refuted Kuchinta's claim and alleged that it had not in any manner breached its duty of care and/or was negligent and/or had breached its obligations pursuant to the contract between CIMB and its customer pertaining to all the cheques. CIMB claimed that it had promptly attended to the complaint by Kuchinta and had even provided temporary relief to Kuchinta in the form of Facility Excess Authorisation ('FEA') pending the resolution of the issue pertaining to the clearance of the cheques. CIMB stated that around the material times, it had encountered some unforeseeable technical problems related to its newly introduced CTCS. CIMB had also denied that it had in any manner defamed and/or lowered the estimation of Kuchinta in the eyes of the recipient of the dishonoured cheques.

Held (allowing plaintiff's claim with costs):

(1) There existed a contractual relationship between a banker and its customer between CIMB and Kuchinta. CIMB had a contractual obligation to ensure that all the four cheques deposited by Kuchinta were processed and deposited into the subject account within the timeline set by CIMB and/or any banking industry, which is two to three days from the date the cheques were deposited. However, the four cheques deposited in the subject account had not been cleared within the standard timeline. (paras 34 & 36)

(2) None of CIMB's witnesses could explain how the CTCS functioned and what went wrong and/or at which point the system went wrong. There was no evidence as to what had caused the delay in the clearance of the cheques. Further, the evidence of CIMB's witnesses pertaining to the root of the problem faced by CTCS were tainted with hearsay evidence. CIMB had not pleaded of the involvement of Symphony Sdn Bhd and/or Re Call Sdn Bhd in CTCS in its defence. Neither were the persons responsible for the failure in the CTCS called to prove the same. If it was true that it was either Symphony Sdn Bhd and/or Re Call Sdn Bhd which was responsible, either party ought to have been called to support the CIMB's contention. (paras 41 & 42)

(3) The court was satisfied that CIMB had failed to clear the cheques which Kuchinta deposited within the normal and reasonable timeline stipulated by it and/or by the banking industry. The testimonies of CIMB's witnesses had corroborated CIMB's failure in ensuring that the cheques were cleared in favour of Kuchinta. CIMB had breached its contractual obligation towards Kuchinta in not clearing the Cheques amounting to RM156,648.00 within the reasonable timeline as set by CIMB and/or any Banking Industry. (para 50)

(4) Between a bank and its customer, there exists a contractual relationship and the relationship is somewhat special. (*Development & Commercial Bank Bhd v. Liew Weng Hang & Ors*, refd). The special relationship that exists between the banker and its customer gives rise to a duty of care towards its customers. Kuchinta had proved that CIMB had also failed in its duty of care towards Kuchinta under the tort of negligence in failing to clear the Cheques within reasonable timeline. (para 51 & 53)

(5) Kuchinta was never made aware of the FEA and its terms and conditions and therefore it would have been impossible for the plaintiff to have known anything on the contentious FEA. Thus, CIMB had failed to discharge its contractual obligations towards Kuchinta by failing to notify or inform the plaintiff of the FEA. (para 59 & 60)

(6) From the evidence, CIMB as a banker had demonstrated its lackadaisical attitude towards "a valued and long serving corporate client". It had failed to exercise due care in ensuring the services provided to Kuchinta were satisfactory and/or that it had failed to act reasonably as a professional and responsible banker. The acts dishonouring the cheques by CIMB put Kuchinta to embarrassment, public humiliation and ridicule. Had CIMB held discussions and communications with Kuchinta and resolved Kuchinta's problems in a more professional and compassionate manner the incidences of its cheques being dishonoured would be minimised. (para 69)

(7) CIMB's action in dishonouring the cheques with the notation "Refer to Drawer" was "highly libellous and tantamount to mean that the plaintiff had been locked up or had gone into liquidation". It was without doubt that the words must have caused embarrassment to Kuchinta and had in fact lowered Kuchinta's standing in the eyes of the recipient of the cheque. Based on this, the plaintiff had made out a case premised on the tort of defamation against CIMB. (paras 70 & 74)

(8) It is trite that libel and slander is actionable *per se*, thus Kuchinta need not prove actual damages. It was defamatory for CIMB to stamp the words "Refer to Drawer" on the seven returned cheques. Therefore damages ought to be awarded against CIMB for wrongfully dishonouring Kuchinta's CIMB cheques especially when there would be more than sufficient funds in the subject account. CIMB had not only breached its contractual obligation but also its duty of care to Kuchinta. The damages of RM50,000 for breach of contractual obligations, RM50,000 for breach of duty of care and RM80,000 for the tort of libel respectively were reasonable and justified. However, the court refused to allow aggravated and exemplary damages prayed for as the facts of this case did not merit and did not fall within the principles for the damages to be awarded. (paras 75, 76, 78 & 81)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd [2008] 5 CLJ 737 CA ***(refd)***

Charles Edward Victor v. Malayan Banking Bhd [2008] 4 CLJ 59 HC ***(refd)***

Development & Commercial Bank Bhd v. Liew Weng Hang & Ors [2007] 6 CLJ 260 CA ***(refd)***
Gibbons v. Westminster Bank Ltd [1939] 2 KB 882 ***(refd)***
Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd [1985] 2 CLJ 390; [1985] CLJ (Rep) 482 HC ***(refd)***
Joachimson v. Swiss Bank Corporation [1921] 3 KB 110 ***(refd)***
Kpohraror v. Woolwich Building Society [1996] 4 All ER 119 ***(refd)***
Lloyds Bank Ltd v. EB Savory & Co [1933] AC 201 ***(refd)***
Malayan Testing Laboratory Sdn Bhd v. Standard Chartered Bank Malaysia Bhd [2010] 9 CLJ 309 HC ***(refd)***
Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***
Marzetti v. Williams [1830] 1 B & Ad 415 ***(refd)***
Mooney & Ors v. Peat, Marwick, Michell & Company & Anor [1966] 1 LNS 109 HC ***(refd)***
Ng Cheng Kiat v. Overseas Union Bank [1984] 1 CLJ 185; [1984] 2 CLJ (Rep) 285 HC ***(refd)***
Ratcliffe v. Evans [1892] 2 QB 524 ***(refd)***
Sim v. Stretch [1936] 2 All ER 1237 ***(refd)***
Teper v. R [1952] AC 480 ***(refd)***
Top-A Plastic Sdn Bhd & Ors v. Bumiputra Commerce Bank Bhd [2006] 3 CLJ 460 HC ***(refd)***
Westminster Bank Ltd v. Hilton (1926) 43 TLR 124 ***(refd)***
Yatin Mahmood v. Mohd Madzhar Sapuan & Ors [2010] 1 LNS 25 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 60

Other source(s) referred to:
Paget's Law of Banking, 9th edn, p 240
Paget's Law of Banking, 11th edn, p 337
Words, Phrases & Maxims, Legally and Judicially Defined, Anandan Krishnan, vol 2A(II), B (2008), p 527
Words, Phrases & Maxims, Legally and Judicially Defined, Anandan Krishnan, vol 3C(I), B (2008), p. 346

For the plaintiff - Jagathisvaran Ramachandran; The Chambers of Jag Ramachandran
For the defendant - Rabindra S Nathan (Sharlini Jeyaratnam with him); M/s Shearn Delamore & Co

Reported by Emm Zehra

A

JUDGMENT

Asmabi Mohamad JC:

Brief Background

B **[1]** The plaintiff, Kuchinta Auto Sdn Bhd ("Kuchinta") is a car dealer for Proton Edar since 1997. Around the same time Kuchinta had opened an account with CIMB Bank Berhad ("CIMB") at its branch at Bandar Sri Damansara under account no. 12520002859059 ("the subject account") for the purpose of its business. Between C 12 June 2008 to 18 June 2008 Kuchinta had deposited into the subject account bankers cheques (the "cheques") numbers 041517 for RM41,600 issued by Public Bank Berhad ("PBB"), 048798 for RM36,100 issued by Eon Bank Berhad ("EBB"), 035199 for RM34,448 issued by Malayan Banking Berhad ("MBB") and D 007293 for RM44,500 issued by and Arab Malaysian Bank Berhad ("AMBB") respectively. The first three cheques were deposited at CIMB Branch at Bandar Sri Damansara on 12 June 2008 and 17 June 2008 respectively and the last cheque was deposited at CIMB Branch in Temerloh on 18 June 2008. These cheques were E related to proceeds Kuchinta received from its end-financiers from the sale of Proton cars bought by the hirers from Kuchinta (see pp. 33-38 of B1).

[2] Around June 2008 one Noor Hazida binti Mohd Noor, an F employee of Kuchinta ("PW1") discovered three of Kuchinta's cheques which were deposited in the subject account had not been cleared for payment. PW2 then wrote a letter dated 12 June 2008 to CIMB requesting CIMB to clear these three cheques (see pp. 28-36 of B1).

G

[3] As at 18 June 2008 the earlier three cheques issued by PBB, EBB and MBB were still pending clearance. On this date one Osman bin Maimunni, the Managing Director of Kuchinta ("PW3") had directed PW1 and another employee of CIMB, one H Mohd Zamani bin Mat Hassan who happened to be PW1's husband to go to CIMB Sri Damansara ("CIMB") to seek clarification with regard to the status of these three cheques ("PBB", "EBB" and "MBB" cheques). PW1 and PW2 were informed by DW2 and DW3 who attended to them the non-I clearance of the three cheques was due to some technical

problems faced by CIMB with its cheque truncation conversion system ("CTCS") which CIMB had just introduced in early June 2008 (see p. 30 of B1).

[4] Subsequently, Kuchinta realised it not only had problem with the non-clearance of its cheques deposited on 12 June 2008, 17 June 2008 and 18 June 2008 but it also discovered seven of its CIMB's cheques under the subject account which it had issued to its creditors for the purpose of its business and/or to its staff had not been honoured by CIMB. This puzzled Kuchinta because despite having deposited the cheques with the total value of RM156,648 in the subject account, its seven CIMB cheques which was worth RM9,961.60 were not honoured and/or was delayed for payment. According to Kuchinta, around the time the seven cheques were issued the subject account would have sufficient funds in it if CIMB had not breached its obligation under the contract by acting within the timeline set by its standard operating procedure (SOP) and/or by the banking industry and/or if CIMB had not breached its duty of care it owed to Kuchinta as its corporate customer. In addition to that, Kuchinta further alleged that by the publication of "01-refer to drawer" on the "return cheque advice" issued by CIMB to Sutra Timur Enterprise, CIMB had defamed Kuchinta and/or had lowered the estimation of Kuchinta in the eyes of the recipient of the said cheque.

[5] By its writ and statement of claim dated 18 November 2008 ("SOC"), Kuchinta claimed against CIMB for damages arising from the delay in clearing the four cheques deposited by Kuchinta into the subject account with CIMB and the failure of CIMB to honour seven of Kuchinta's CIMB cheques issued by Kuchinta for payments to its creditors and/or staff.

[6] In its defence dated 13 February 2009, CIMB refuted Kuchinta's claim and alleged that it had not in any manner breached its duty of care and/or was negligent and/or had breached its obligations pursuant to the contract between CIMB and its customer pertaining to the four cheques deposited by Kuchinta in the subject account as well seven of its CIMB's cheques Kuchinta issued to its creditors and/or staff. CIMB claimed that it had promptly attended to the complaint by Kuchinta and had even provided temporary relief to Kuchinta in the form of facility excess authorisation ("FEA") pending the

resolution of the issue pertaining to the clearance of the cheques. According to CIMB it was Kuchinta which had failed to lodge a complaint about the problem it encountered with CIMB and/or that it was Kuchinta which had contributed to the tort of negligence. Kuchinta had also failed to ensure that it had sufficient funds in the subject account before the seven cheques were issued to its creditors and/or staff. CIMB stated that around the material times it encountered some unforeseeable technical problems related to its newly introduced CTCS. CIMB had also denied that it had in any manner defamed and/or lowered the estimation of Kuchinta in the eyes of the recipient of the dishonoured cheques.

[7] This case proceeded by way of a full hearing with three witnesses having testified for the plaintiff and three witnesses testified for the defendant. After giving full consideration to the evidence, both documentary as well as testimonial, and the submissions by both learned counsels for the respective parties, I allowed the plaintiff's claim against the defendant in terms of liability as the plaintiff had proved its case on the balance of probabilities. I proceeded to award damages in the sum of RM50,000 for breach of contract, RM50,000 for tort of negligence and RM80,000 for libel. After hearing a short submission on the issue of costs, I awarded the defendant costs of RM40,000.

[8] Aggrieved by the said decision, the defendant appealed to the Court of Appeal Malaysia against the whole of the said decision.

The Documents

[9] At the outset of the trial, parties have agreed for the following documents to be used:

Description		Document
(a) Bundle of Pleadings	-	"A"
(b) Common Agreed Bundle of Documents (A)	-	"B1"
(c) Common Agreed Bundle of Documents (B)	-	"B2"
(d) Common Agreed Bundle of Documents (C)	-	"B3"
(e) Defendant's Supp Bundle of Documents	-	"B4"

(f) Issues To Be Tried - "C"

(g) Statements of Agreed Facts - "D"

(h) Plaintiff's Opening Statement - "E"

The Issues To Be Tried

[10] Parties had framed 18 issues to be tried as stated in document marked as "C". Basically these issues relate to the timing of the crediting of the four cheques and the non-clearance of seven of CIMB cheques under the subject account.

[11] The broad issues can be summarised as follows:

(a) Whether CIMB had failed and/or neglected to credit into the subject account the four banker's cheques with the value of RM156,648 within the timeline stipulated by CIMB and the banking industry;

(b) Whether CIMB's failure and/or negligence in ensuring the four banker's cheques were credited into the subject account within the timeline stipulated by CIMB and the banking industry tantamount to breach of contract between a banker and its customer;

(c) Whether CIMB's failure and/or negligence in ensuring the four banker's cheques were cleared into the subject account within the stipulated timeline by CIMB and the banking industry tantamount to breach of duty of care by the banker towards its customer;

(d) Whether the "return cheque advice" issued by the defendant to Sutra Timur Enterprise specifying the reason for the return of the CIMB cheque "01-refer to drawer" was wrong, without justification and/or truth, and whether it had defamed the plaintiff and/or lowered the estimation of Kuchinta in the eyes of the recipient of the dishonoured cheque;

(e) Whether the failure and/or the breach of CIMB's duty to ensure that the seven CIMB cheques were honoured and cleared for payment had embarrassed Kuchinta and/or had lowered Kuchinta's estimation in the eyes of the recipients of the cheques;

(f) Whether CIMB had failed to honour the seven of CIMB cheques issued to its creditors and/or staff;

(g) Whether the failure of CIMB to fulfil its contractual obligations and/or its duty of care to Kuchinta, its customer had caused Kuchinta to suffer loss and damages.

Case For The Plaintiff

[12] PW1 commenced her employment with Kuchinta as an accounts executive in March 2008 and resigned in April the following year. At the time PW1 commenced her employment with Kuchinta, the Managing Director of Kuchinta was PW3. Between 12 June 2008 to 18 June 2008 Kuchinta had deposited cheques numbers 041517 for RM41,600 issued by PBB, 048798 for RM36,100 issued by EBB, 035199 for RM34,448 issued by MBB and 007293 for RM44,500 issued by AMBB into the subject account. The first three cheques were deposited at CIMB Branch at Bandar Sri Damansara and the last cheque was deposited at CIMB Branch in Temerloh. These cheques were related to proceeds Kuchinta received from its end-financiers from the sale of Proton cars bought by the hirers from Kuchinta (see pp. 33 to 38 of B1).

[13] Around June 2008 Kuchinta had encountered difficulties with the subject account, in that, the cheques Kuchinta deposited in the subject account in CIMB and one cheque it deposited in CIMB Temerloh Branch were not cleared for payment. The first two cheques from PBB and EBB were deposited on 12 June 2008. The third cheque from MBB and fourth cheque from AMBB were deposited on 17 June 2008 and 18 June 2008 respectively. The value of these four cheques were RM156,648 (see pp. 34-38 of B1).

[14] The PBB cheque no. 041517 for RM41,600 was deposited on 12 June 2008 at CIMB, which cheque Kuchinta received from the end-financiers, being payment of the balance purchase price of a Proton car, bought by a hirer from Kuchinta was lost (p. 33 of B1). This cheque was subsequently replaced by banker's cheque no. 042161 for the same value and credited to the subject account on 5 August 2008, 54 days after it was initially deposited at CIMB (see B2 at p. 3). The EBB banker's cheque no. 048798 for RM36,100 was deposited at CIMB being monies received from

end-financiers (see pp. 33 and 34 of B1). This cheque too was lost and was replaced by banker's cheque no. 094627 which was credited into the subject account at CIMB on 7 August 2008, 56 days after it was initially deposited at CIMB. The MBB cheque no. 035199 for RM34,448 was deposited at CIMB being monies Kuchinta received from end-financier as payment of the balance purchase of a Proton car bought by a hirer from Kuchinta. This cheque was credited into the subject account on 27 June 2008, ten days after the cheque was deposited at CIMB. The AMBB cheque no. 007293 for RM44,500 was received by Kuchinta as payment of the balance purchase price of a car bought by a hirer from Kuchinta was cleared on 4 July 2008 16 days after it was deposited at CIMB at Temerloh Branch. The summary of the four banker's cheques, the particulars of which were admitted by CIMB by way of document "D" are as illustrated in the table 1 below:

TABLE 1

Financier	Cheque No	Cheque Sum	Date Deposited	Date Paid	Request for Replacement Cheque	No.of days taken to pay
PBB	No.041517	RM41,600	12.06.2008	5.8.2008*	Yes	54
EBB	No.048798	RM36,100	12.06.2008	7.8.2008*	Yes	56
MBB	No.035199	RM34,448	17.06.2008	27.6.2008	No	10
AMBB	No.007293	RM44,500	18.06.2008	4.7.2008	No	16
	Total	RM156,648				

[*Payment made after cheques replaced

(Cheque No. 041517 replaced by Cheque No. 042161;

Cheque No. 048798 replaced by Cheque No. 094627])

[15] As these cheques had not been cleared, PW1 contacted one Encik Mohd Alimi Ismail ("DW2"), an employee of CIMB and Puan Nik Habsah binti Nik Mahmood, the Branch Manager of CIMB ("DW3") on a few occasions to find out the root of the problem. PW1 was told these cheques were lost at the "Cheque Processing Centre".

[16] On 18 June 2008 one, Mohd Zamani bin Mat Hassan ("PW2") who was also an employee of Kuchinta was directed by PW3 to accompany PW1, who is also his wife to meet up with DW3 to try to resolve the problems encountered by Kuchinta. During this meeting DW3 admitted that around the material times CIMB was facing some unforeseeable technical problems with its CTCS which CIMB had just introduced. Besides the problem of non-clearance of the four cheques, PW1 was also aware that several of Kuchinta's CIMB's cheques which were issued to its creditors and staff had been dishonoured by CIMB. *Vide* a letter dated 30 July 2008 CIMB explained to Kuchinta the problem which was highlighted during the meeting on 18 June 2008 between representatives of Kuchinta and CIMB was "due to migration to new industry-wide cheque truncation system" (see p. 30 of B1).

[17] During the meeting with DW3 both PW1 and PW2 were assured by DW3 that CIMB would look into the matter and as an interim measure and until the issue pertaining to the lost cheques was resolved, CIMB would grant an "overdraft" like facility to Kuchinta. CIMB admitted that as the problem was due the CTCS. Kuchinta was not required to make formal application or execute any documents with regard to "overdraft" facility granted to it whilst the problem it had with CTCS was being investigated.

[18] In his testimony PW3 confirmed that the problem pertaining to the non-clearance of Kuchinta cheques was reported to him by PW1. After PW3 had become aware of the problem faced by Kuchinta, PW3 had instructed PW1 to be accompanied by PW2 to go to CIMB and check this out with CIMB as this problem had affected the cash flow of Kuchinta, a company dealing with the business in selling new Proton cars. PW3 confirmed that CIMB had explained to Kuchinta *vide* its letter dated 30 July 2008 the problem was related to CIMB's CTCS which it had just introduced. However this explanation was done almost two months after the cheques were deposited into the subject account (see p. 30 of B1). PW3 had also discovered that two of the cheques which were deposited for clearance were lost during transit to the CTCS.

[19] CIMB had also sought Kuchinta's assistance to inform the drawer of the cheques to place "stop payment" on these missing cheques (see p. 32 of B1). CIMB had also written to PBB to confirm that the cheque was lost due to the crisis CIMB was facing on the CTCS and in the same letter CIMB had sought PBB to replace cheque no. 041517 for the sum of RM41,600 (see p. 31 of B1). The replaced cheque was deposited in the subject account on 5 August 2008 (see p. 11 of B1). The second lost cheque deposited on 12 June 2008 in the sum of RM36,100 issued by EBB too was also replaced by the end-financier and credited into the subject account on 7 August 2008 (see p. 12 of B1). According to PW3 the CIMB transaction history disclosed that the MBB cheque no. 035199 for the sum of RM34,448 deposited on 17 June 2008 and AMBB cheque no. 007293 for the sum of RM44,500 deposited on 18 June 2008 in the subject account had been cleared on 27 June 2008 respectively (see pp. 3 and 4 of B1).

[20] Besides the issue of the non-clearance of the four cheques, Kuchinta had also encountered another problem with CIMB, in that, CIMB had failed and/or neglected to honour seven CIMB cheques issued by Kuchinta to its creditors or staff. On or about 28 July 2008 Kuchinta had received a call from AMBB informing Kuchinta its cheques in the sum of RM1,476 and RM1,508.80 had been dishonoured by CIMB. One of these cheques was for the hire purchase account of Kuchinta with AMBB and the other cheque was for the redemption sum for one unit of car under the floor stock facility from AMBB (see p. 6 of B1). These cheques were returned with the endorsement "CLRG CHG RTN - NSF" indicating that these cheques were returned because of insufficient (see pp. 6, 25 and 26 of B1). Initially even DW3 was not able to provide any explanation pertaining to the problem which relate to the seven dishonoured cheques. However on checking with CIMB's headquaters DW3 informed PW3 the reason the seven cheques were not honoured was because Kuchinta did not have sufficient fund in the subject account. Further the FEA made available to Kuchinta had been withdrawn and/or valid only for a certain limited duration.

[21] PW3 was also informed by DW3 the PBB cheque no. 041517 for the sum of RM41,600 and EBB cheque no. 048797 for the sum of RM36,100 deposited on 12 June 2008 could not be located and the respective banks were requested to replace the cheques with new cheques. However these cheques were cleared only on 5 August 2008 and 7 August 2008 respectively some 54 and 56 days after these cheques were deposited into the subject account.

[22] Apart from the two Kuchinta's CIMB cheques mentioned above five more of Kuchinta's CIMB cheques had been dishonoured by CIMB, three cheques on 29 July 2008 and two more cheques on 31 July 2008 for the same reason as stated above, "CLRG CHG RTN - NSF". These cheques were nos. 387110 for RM160, 387208 for RM1,008.30 and 387199 for the sum of RM2,808.50 The remaining two cheques were nos. 387175 for the sum of RM1,500 and 410910 for the same amount (see pp. 7 and 8 of B1).

[23] These five dishonoured cheques were issued amongst others to Sutra Timur Enterprise for some printing work (RM160) which was dishonoured on 29 July 2008, Alliance Insurance for RM1,008.30 being insurance payment for the plaintiff's customer, dishonoured on 29 July 2008, AMBB for RM2,808.20 to redeem one unit of car which was dishonoured on 29 July 2008, MBB for RM1,500 for overdraft account which was dishonoured on 31 July 2008 and lastly EBB cheque for RM1,500 dishonoured on 31 July 2008 then cleared on the same date and reversed on 4 August 2008. The value of all these dishonoured cheques was RM9,961,60. As a result of its cheques being dishonoured Kuchinta had to issue a letter to CIMB listing down all the cheques Kuchinta expected to be honoured by CIMB (see p. 2 of B2). The following day PW3 was informed by DW3, two more of its CIMB cheques were dishonoured. PW3 was annoyed and demanded CIMB to honour these cheques. All transactions involving Kuchinta's CIMB's cheques could be seen at pp. 9 and 10 of B1. The summary of CIMB cheques deposited and dishonoured can be seen in the Table 2 below:

TABLE 2

Cheque No.	Amount	Deposited	Recipient	Payment For
387156	RM2,950.00	4.7.2008	AMBB	Redemption
410723	RM1,476.00	25.7.2008	AMBB	Hire Purchase
317196	RM1,508.00	25.7.2008	AMBB	Car registration
387110	RM160.00	28.7.2008	Sutra Timor	Printing work
387208	RM1,008.30	28.7.2008	Alianz	Insurance
387199	RM2,808.50	28.7.2008	AMBB	Car registration
387175	RM1,500.00	30.7.2008	MBB	Overdraft
410910	RM1,500.00	28.7.2008	AMBB	Car registration

[24] Despite Kuchinta having more than sufficient funds in the subject account its cheques were being dishonoured by CIMB and this puzzled PW3. The two lost cheques and the non-clearance of the other two cheques had affected Kuchinta cash flow and its business. Kuchinta faced insufficient funds in the subject account. The action of CIMB had injured Kuchinta commercial credit among its creditors, customers, car dealers and financial institution. Kuchinta claimed that CIMB had breach not only its contractual obligation but also its duty of care to Kuchinta as its valued customer. Besides that, Kuchinta had also claimed that the endorsement of "CLRG CHG RTN - NSF" on the cheque worth RM160 had defamed and/or lowered the estimation of Kuchinta in the eyes of the recipient of the dishonoured cheque. Therefore Kuchinta claimed for the damages both general, exemplary and aggravated, cost and interest.

Case For The Defendant

[25] One Mohamad Alimi Ismail ("DW2") testified that he is an employee of CIMB, having commenced employment with CIMB since 1983. At the time DW2 testified he was working as a customer service officer in CIMB. DW2 confirmed that Kuchinta is a customer of CIMB under current account no. 12520002859059. DW2 too was aware of the problems encountered by Kuchinta in relation to the four cheques that were deposited into the subject account. DW2 confirmed that a representative of Kuchinta had

called CIMB to cheque on the status of these cheques and he had advised the said representative to provide the particulars of the "cheques deposit slip" to enable him to verify the status. The copy of the "cheque deposit slips" in respect of three of these four cheques, the PBB, EBB and MBB cheques were faxed to DW2 (see pp. 33 to 37 of B1). On 17 June 2008 and upon receipt of the fax, DW2 contacted the i-CIMB help desk operated by i-CIMB (M) Sdn Bhd which is part of CIMB's group that handle the cheque processing for CIMB, to enquire the status of the said three cheques.

[26] DW2 confirmed that on 18 June 2008, PW1 and PW2 had attended at CIMB to inquire whether these three cheques which Kuchinta had deposited on 12 June 2008 and 17 June 2008 respectively had been cleared. At first PW1 and PW2 was attended by DW2 as he was on duty at the counter. The complaint lodged at the counter was with regard to the non-clearance of Kuchinta's cheques which it deposited on 12 June 2008 and 17 June 2008 respectively.

[27] DW2 informed PW1 and PW2 the reason for the non-clearance of the three cheques were probably due to the unforeseeable technical difficulties resulting from the implementation of the CTCS which was implemented on 13 June 2008 on a nationwide scale under the direction of Bank Negara Malaysia. Both PW1 and PW2 were not satisfied with the explanation given by DW2 and insisted they be given the opportunity to see DW3, the branch manager.

[28] DW2 assisted PW1 and PW2 to fill up i-CIMB help desk complaint forms which were submitted to CIMB *via* fax transmission (see pp. 56 to 58 of B3). These were FEA forms which is a temporary line of credit specially provided by CIMB to its customers during the occurrence of the CTCS related technical problems. These forms would be filled up by an officer of CIMB and later faxed to business credit management ("BCM") together with supporting documents for BCM's approval. The FEA which is generally valid for a period not exceeding one month would have to be approved by BCM within the same day. All decisions pertaining to FEA would be decided by BCM. The customer has no part to play in the exercise. Except for one FEA application the rest of the FEA forms were handled by the branch manager, DW3.

[29] There were four FEA applications made for Kuchinta which were dated 19 June 2008 (for the duration of seven days), 25 June 2008 (for the duration of one month, 2 July 2008 (for the duration of ten days) and 31 July 2008 (for the duration one month) respectively (see pp. 51, 52, 53, 54 and 55 of B3). The FEA forms were internal documents and Kuchinta was not in any manner associated or were involved in the FEA process. Only CIMB officers would be involved with the whole process.

[30] DW3 confirmed that Kuchinta was and is still a customer of CIMB. Most of the facts pertaining to the timing of the crediting of the four cheques and the non-clearance of seven of Kuchinta's CIMB's cheques under the subject account were within the personal knowledge of DW3. DW3 admitted that as the branch manager at the material time she had attended to the complaints by Kuchinta. DW3 admitted having met PW1, PW2 and PW3 around the material times over these issues. DW3 testified that CIMB had assisted Kuchinta in overcoming the problems encountered by Kuchinta over the non-clearance of the cheques that were deposited by providing FEA, a temporary line of credit normally reserved to CIMB's valued customers. The approval of FEA would be made by BCM at the headquarters level of CIMB.

[31] According to DW3, FEA would be allowed and approved by CIMB to enable a customer of CIMB to issue cheques which would be good for payment within the validity of FEA despite the customer having insufficient fund in his account. In other instance a customer of CIMB must ensure that it has sufficient funds in the account before issuing cheques. Under CIMB standard terms and conditions of operation of a current account CIMB is allowed to return cheques if there is insufficient fund in the account.

[32] DW3 explained that FEA is granted to a customer at the discretion of CIMB. The customer is not required to apply for FEA and is not in any way involved with the application or approval of FEA. The process only involved CIMB officers. As a branch manager, DW3 was authorised to make applications for FEA for customers of CIMB. DW3 confirmed that, there were four FEAs granted to Kuchinta and the FEAs that could be seen at pp. 51, 52, 54 and 58 of B3 were processed by her. DW3 had also confirmed that she had attended to PW1, PW2 and PW3 pertaining to the issues at hand and she had explained to PW3

A that Kuchinta's cheques were returned because of insufficient funds in the subject account and these cheques were not issued within the validity period of the FEA. CIMB had also explained to PW1, PW2 and PW3 the reason which caused the cheques not to be cleared was due to the unforeseeable technical
B difficulties CIMB faced during the implementation of the CTCS. In the course of that DW3 admitted having asked Kuchinta to request PBB and EBB respectively to cancel PBB and EBB cheques and replace these cheques with new cheques to be cleared. As regards the seven CIMB's cheques which were
C dishonoured by CIMB, CIMB stated that reason these cheques were not cleared was because there was insufficient fund in the subject account. The problem encountered by Kuchinta was a frolic of its own in not ensuring it has sufficient funds in the subject account before the cheques were issued. CIMB denied
D any liability and prayed for Kuchinta's claim to be dismissed with costs.

Findings Of The Court

E **[33]** I propose to deal the following issues first which concern the four cheques that were deposited with CIMB and CIMB Temerloh:

(a) Whether CIMB had failed and/or neglected to credit into the subject account the four banker's cheques with the value of
F RM156,648 within the timeline stipulated by CIMB and the banking industry;

(b) Whether CIMB's failure and/or negligence in ensuring the four banker's cheques were credited into the subject account
G within the timeline stipulated by CIMB and the banking industry tantamount to breach of contract between a banker and its customer; and

(c) Whether CIMB's failure and/or negligence in ensuring the four banker's cheques were cleared into the subject account within
H the stipulated timeline by CIMB and the banking industry tantamount to breach of duty of care by the banker towards its customer.

I

Whether CIMB Had Breach Its Contractual Obligation Towards Kuchinta

[34] Based on the evidence before me both testimonial as well as documentary it is not disputed that all these four cheques which I had listed in table 1 had been deposited in the subject account had not been cleared within two to three days as set by CIMB and/or within any reasonable time and/or timeline set by the banking industry for that matter. From the testimonies of the witnesses of CIMB, the time taken by CIMB to clear the above-mentioned cheques were 56, 54, 10 and 16 days respectively and not within the standard timeline of two to three days as set by CIMB to its customers and/or the timeline as set by the banking industry to its customers.

[35] As I had illustrated under topic case for the plaintiff all of CIMB witnesses had knowledge of the problem faced by Kuchinta. DW1, DW2 and DW3 admitted having met PW1, PW2 and PW3 during the time the cheques were deposited as PW1, PW2 and PW3 had wanted to know the status, the reason for the delay in clearance of these cheques and how fast the cheques could be cleared by CIMB. This was because Kuchinta needed cash flow for the purpose of its business. Other than the verbal queries, letters were also sent providing CIMB with the particulars of the cheques which were not cleared within the reasonable time of two to three days a banker's cheque would normally be cleared for payment in normal and ordinary circumstances.

[36] The issue for consideration was whether CIMB had breached its duty as a reasonable banker to Kuchinta in not clearing the four cheques within the normal and reasonable time any ordinary and/or reasonable bank would do. I had explained the chronology of events from the time these cheques were deposited until the time these cheques were finally cleared by CIMB. It is not disputed that between CIMB and Kuchinta there existed a contractual relationship between a banker and its customer. CIMB had a contractual obligation to ensure that all the four cheques deposited by Kuchinta are processed and deposited into the subject account within the timeline set by CIMB and/or any banking industry, which is two to three days from the date these cheques were deposited. These cheques were

banker's cheques and not an ordinary cheque and there is no risk at all on CIMB, the receiving bank. In the case of banker's cheques the payee is somewhat secured of the payable amount stated in the banker's cheques. Hence it was CIMB's duty to ensure that these cheques which were issued in the name of Kuchinta were deposited and amount cleared into the subject account.

[37] The relationship between a banker and its customer had been explained in "*Words, Phrases & Maxims, Legally and Judicially Defined*" by Anandan Krishnan, vol. 2 A (II), B (2008), at p. 527 where the judgment of Lord Atkinson in *Westminster Bank Ltd v. Hilton* (1926) 43 TLR 124 at p. 126 had been quoted as follows:

> The relationship between a banker and his customer is contractual in nature. When a customer deposits money in a bank account the relationship is that of creditor and debtor; in relation to the drawing and payment of the customer's cheques drawn on to the customer's account the relationship is that of principal and agent.

[38] Further "*Words, Phrases & Maxims, Legally and Judicially Defined*" by Anandan Krishnan, vol. 3 C (I), B (2008), at p. 346 Anandan Krishan stated:

> A cheque is a Bill of Exchange drawn on a Banker, payable on demand (s. 73 Bills of Ex Act 1882). **It is an order on a bank purporting to be drawn upon a deposit of funds for the payment of a specified sum of money**, on presentation, to the person named in the document, or to him on his order or to the bearer. It is made payable instantly on demand (emphasis added).

[39] In *Bumiputra-Commerce Bank Bhd v. Top-A Plastic Sdn Bhd* [2008] 5 CLJ 737, the case quoted by the learned counsel for Kuchinta in the learned counsel's written submission, Her Ladyship Heliliah Mohd Yusof JCA (as she then was) had referred to the judgment of Lord Atkin in *Joachimson v. Swiss Bank Corporation* whereby His Lordship had described the relationship between a banker and its customers to mean:

> The issue on liability here pertains to the matter of the relationship between banker and its customer. The relationship was considered in *Joachimson v. Swiss Bank Corporation* [1921] 3 KB 110. The judgment of Atkins LJ contains *inter alia* the following:
>
> > The question seems to turn upon the terms of the contract made between banker and customer in ordinary course of business when a current account is opened by the bank. It

> is said on the one hand that it is a simple contract of loan; it is admitted that there is added, superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at the material time; but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender can sue for his debt whenever he pleases. I am unable to accept this contention. I think there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. **The bank undertakes to receive money and to collect bills for its customer's account**. The proceeds so received are not to be held in trust for the customer, **but the bank borrows the proceeds and undertakes to repay them**. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept (emphasis added).

[40] Coming back to the case at hand, as a reasonable and prudent banker, CIMB must ensure that the interest of Kuchinta be safeguarded. CIMB had a duty to ensure that the cheques which were deposited must be cleared within the timeline it had set in its SOP and/or the timeline set by the banking industry which according to the defence witnesses was between two to three days. As could be seen at table 1 above there was a delay of 54, 56, 10 and 16 days respectively in the clearance of the cheques. Two of the cheques had gone missing and had to be replaced with new cheques by the issuing bank. None of CIMB's witnesses could explain to Kuchinta and/or to the court what had actually happened and/or what had caused the cheques to have gone missing.

[41] None of CIMB's witnesses could explain how the CTCS functioned and what went wrong and/or at which point the system went wrong. It was unravelled during the trial, although not pleaded by CIMB that the CTCS was sourced out to another entity known as Symphony Sdn Bhd whilst the storage of the cheques for purposes of CTCS was handled by another company known as Re Call Sdn Bhd. Hence there was no evidence before me as to what had caused the delay in the clearance of the cheques. All DW1, DW2 and DW3 could say was, they were told by their friends from other banks there was some technical problems with the CTCS which had affected the whole banking industry. According to them this was a known fact and a common problem faced by the banking industry at the material time. However beyond what was orally told to this court there was nothing credible shown or proved by CIMB pertaining to the real reason for non-clearance of the cheques and/or whether the cause of the problem was attributable to the technical problem faced the CTCS during the early stages of its implementation.

[42] The evidence of CIMB's witnesses pertaining to the root of the problem faced by CTCS was not based on their personal knowledge but by what was told to these witnesses by other people. Therefore the evidence of DW1, DW2 and DW3 were tainted with hearsay evidence as these facts were within the personal knowledge of Symphony Sdn Bhd and/or Re Call Sdn Bhd. The least CIMB could have done was to prove by way of credible evidence that they had acted reasonably and prudently in handling Kuchinta's cheques and/or to prove that what had happened in this case was beyond its control and/or that CIMB had taken all reasonable steps as a reasonable and prudent banker to expedite the clearance of the cheques. CIMB had not pleaded in its defence of the involvement of these two companies in CTCS. Neither were the persons who were responsible for the failure in the CTCS called to prove the same. Based on the evidence before me if it was true that it was either Symphony Sdn Bhd and/or Re Call Sdn Bhd which was responsible either party ought to have been called to support the CIMB's contention. Symphony Sdn Bhd or Re Call Sdn Bhd would be in a better position to enlighten the court as to the real problem which had resulted in the delay of the clearance of these cheques and/or the reason for the missing cheques. Symphony Sdn Bhd was said to

be the party which handled the machinery used for the purpose of CTCS and Re Call Sdn Bhd was involved with the storage of the cheques. CIMB had failed to call the real party at the ground which would be able to shed some lights to the problem faced by CIMB in clearing Kuchinta's cheques.

[43] It is pertinent to note at this juncture in explaining the root of the problem which had resulted in the delay of the clearance of these cheques CIMB's witnesses relied heavily on hearsay evidence. These witnesses were not able to explain the mechanism and/or the process involved in CTCS and what had really happened to these cheques after the same were deposited. In my assessment of their evidence pertaining to this issue, I have considered the provision of s. 60 of the Evidence Act 1950 and decided cases on the law with regard to hearsay evidence discussed below.

[44] In *Teper v. R* [1952] AC at p. 480 Lord Normand said:

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.

[45] In *Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp* [1986] CLJ (Rep) 185; [1986] 2 CLJ 285; [1986] 2 MLJ 124 the Federal Court had held that:

> In our view the material part of the evidence of DW1 was clearly hearsay evidence. His evidence was derived from interviews and not from his own knowledge. The learned Judge was perfectly right to hold that such evidence was hearsay. Objection should have been taken to the evidence of DW1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier. The authorities are clear on this. Perhaps, it is only necessary to cite Sarkar, *Law of Evidence*, 13th Edition, page 51 which reads:
>
> > An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the Court to exclude all irrelevant and inadmissible evidence even if no objection is taken to its admissibility by the parties ...

[46] PW1, PW2 and PW3 had admitted that their evidence was derived from what they heard from their friends in the banking industry. From my evaluation of their evidence, I am satisfied that PW1 had no personal knowledge and relied on what were told by their friends in other bank. In fact the letter to explain the reason had come only after the whole process was over (see p. 30 of B1).

[47] It had been illustrated in the case of *Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd* [1985] CLJ (Rep) 482; [1985] 2 CLJ 390 HC where the plaintiff in this case had bought five bank drafts from the Kepong Branch of Malayan Banking and gave to its client as payment for the supply of coconuts. When these bank drafts were first presented by the client for payment at the Malayan Banking Tanjung Karang Branch on 2 May 1981, no payment was made on that date. The defendant had wanted to obtain clearance from the issuing branch but was not able to do so due to the telegraphic breakdown in Kepong and the bearer was asked to come again on 4 May 1981. The drafts were again dishonoured when the same were presented. All drafts were cleared on 6 May 1981. Despite the fact that there was telegraphic breakdown the court held that there was breach of contract.

[48] From the facts that were adduced during the trial the problem faced by Kuchinta was not only due to the CTCS technical problem faced by CIMB as claimed by CIMB but there were also two accounts of missing cheques possibly due to human factor. CIMB's witnesses had explained under the CTCS at certain stage of the process the cheques had to be handled by human which could lead to these cheques being misplaced, lost or even dropped due to human factor. The same could have happened in this case where two of the cheques went missing and had to be replaced with new cheques. However CIMB's witnesses were not able to explain how these cheques went missing which had resulted in these cheques having been cleared some 54 and 56 days later.

[49] CIMB had lost the two cheques and the fact showed that Kuchinta's had been directed to request from PBB and EBB respectively for these cheques to be replaced with new banker's cheques. This showed that the problem faced by Kuchinta was not merely centred on the technical problem faced by the CTCS but also due to human error in handling the cheques. CIMB could

not fault the CTCS alone to justify its act in not clearing the cheques earlier. How could CIMB justify the two missing cheques which could have happened at the time of collection and bundling before the same was being fed into the CTCS for processing.

[50] On the evidence before me, I am satisfied that CIMB had failed to clear the cheques which Kuchinta deposited within the normal and reasonable timeline stipulated by it and/or by the banking industry. The testimonies of all three of CIMB's witnesses had corroborated CIMB's failure in ensuring that these cheques were cleared in favour of Kuchinta. Based on the foregoing, I am of the view that CIMB had breached its contractual obligation towards Kuchinta in not clearing the cheques amounting to RM156,648 within the reasonable timeline as set by CIMB and/or any banking industry.

Whether There Are Breach Of Duty Of Care

[51] As regard whether CIMB had breached its duty of care to its customer, in this case Kuchinta, suffice for me to quote the case of *Development & Commercial Bank Bhd v. Liew Weng Hang & Ors* [2007] 6 CLJ 260 which held that between bank and its customer there exists a contractual relationship and this relationship is somewhat special. In the above quoted case it was held that the special relationship that exists between the banker and its customer gives rise to a duty of care towards its customers. His Lordship Raja Azlan Shah (as His Royal Highness then was) held that in a situation where there exists a relationship similar to contract there is a duty of care and this relationship may be of a general character or a particular character (see *Mooney & Ors v. Peat, Marwick, Michell & Company & Anor* [1966] 1 LNS 109). In the case of *Yatin Mahmood v. Mohd Madzhar Sapuan & Ors* [2010] 1 LNS 25; [2010] 8 MLJ 647 His Lordship Vernon JC (as His Lordship then was) said that the standard of care between the banker and its customers is derived from the ordinary practice of bankers as illustrated in the House of Lords case of *Lloyds Bank Ltd v. EB Savory & Co* [1933] AC 20, that is, the banker must not act recklessly by failing to make inquiries as a diligent and reasonable person would.

[52] In the book entitled *Law of Banker and Customer Fourth Edition*, the learned author Poh Chu Chai reiterated that "inherent in the mandate of a customer is the duty of a banker to carry out the mandate with reasonable care".

[53] From the above factual matrix of the case I am also satisfied that Kuchinta had proved to this court that CIMB had also failed in its duty of care towards Kuchinta under the tort of negligence in failing to clear the cheques within the reasonable timeline.

Whether CIMB Had Breach Its Contractual Relationship/Duty Of Care Is Not Honouring The Seven CIMB Cheques

[54] The next issue for determination relate to the seven CIMB cheques which were dishonoured by CIMB, allegedly due to insufficiency of funds in the subject account. The particulars of the transactions were as shown in table 2 above. The issue for determination was whether CIMB had failed both in its contractual obligation as well as its duty of care in honouring the seven CIMB cheques and/or whether the endorsement of the words "01-refer to drawer" tantamount to a libel which entitled Kuchinta to claim for damages from CIMB.

[55] It was not disputed by CIMB that these seven CIMB cheques issued by Kuchinta to its creditors as well as to its staff were dishonoured by CIMB. It was also not disputed that Kuchinta still had the funds and/or credits beyond the amount of the seven CIMB cheques pending clearance due to the technical problem faced by CTCS, at some point or the other, had these cheques been cleared. The details of the transactions involving these seven cheques and the returned CIMB cheques could seen at table 2 and 3 below:

TABLE 2

Cheque No.	Amount	Deposited	Recipient	Payment For
387156	RM2,950.00	4.7.2008	AMBB	Redemption
410723	RM1,476.00	25.7.2008	AMBB	Hire Purchase
317196	RM1,508.00	25.7.2008	AMBB	Car registration
387110	RM160.00	28.7.2008	Sutra Timor	Printing work
387208	RM1,008.30	28.7.2008	Alianz	Insurance
387199	RM2,808.50	28.7.2008	AMBB	Car registration
387175	RM1,500.00	30.7.2008	MBB	Overdraft
410910	RM1,500.00	28.7.2008	AMBB	Car registration

TABLE 3

RETURNED CIMB CHEQUES

	CIMB BANK BERHAD CHEQUES						
	410723[1]	387196[2]	387110[3]	387208[4]	387199[5]	410910[6]	387175[7]
	RM 1476	RM 1508.80	RM 160	RM 1008.30	RM 2808.50	RM 1500	RM 1500
Date Presented	25.7.2008	25.7.2008	28.7.2008	28.7.2008	28.7.2008	30.7.2008	30.7.2008
Date Returned	28.7.2008	28.7.2008	29.7.2008	29.7.2008	29.7.2008	31.7.2008	31.7.2008
Balance in the Plaintiff's Current Account at Presentation (RM)	-57249.16	-58758.16	-6783.36	-7791.66	-10600.16	-16889.71	-18389.71

[1] B1:55
[2] B1:55
[3] B1:55
[4] B1:55
[5] B1:55
[6] B1:56
[7] B1:56

[56] Table 2 above provided the particulars of the CIMB cheques, the time these cheques were deposited, the recipients of these cheques and the amount of each cheque and the purpose these cheques were issued. With regard to these seven CIMB's cheques, CIMB simple defence was that it was not able to process or honour these CIMB cheques because there were no sufficient funds in the subject account at the material times. Further during the times these CIMB cheques were deposited the FEA which CIMB granted to Kuchinta had lapsed and/or the FEA did not cover this period. It must also be remembered that Kuchinta's four cheques which were deposited had not been cleared by CIMB which amount was far bigger and larger than the value of the seven cheques at certain point or the other. It was also not disputed at some point or the other CIMB had honoured some of Kuchinta's CIMB's cheques despite the fact that there were insufficient funds in the subject account. How did CIMB account for this inconsistent behaviour.

[57] What would a reasonable and prudent banker in the position of CIMB do, given the factual matrix of this case. From the evidence of the witnesses of CIMB it was not disputed that CIMB had not provided any alternative arrangement to alleviate Kuchinta's problem during the crucial period encountered by Kuchinta when its cheques which ought to have been cleared in the ordinary and normal circumstances were not cleared by CIMB. It was also in evidence that there were instances CIMB had provided FEA to assist the plaintiff in honouring the CIMB cheques it issued to its creditors. It is also not disputed that the FEA which was provided to Kuchinta and the process involved in clearing the CIMB cheques issued by Kuchinta was only within the knowledge of CIMB officer. All CIMB's witnesses admitted that it was a unilateral act of CIMB to apply to BCM for FEA and to decide to clear certain CIMB cheques issued by Kuchinta despite the fact that there was insufficient funds in the subject account. Kuchinta was not in any way involved or in the know about the FEA granted to it, the manner and/or even the duration of the FEA. Kuchinta was not given copies of the i-CIMB help desk complaint forms (see pp. 56-58 of B3) and/or FEA applications forms (see pp. 51-55 of B3) or given copies of FEA approvals. Table 4 shows the FEA approved limits and durations.

TABLE 4

FEA Approved Limits and Periods

	19.6.2008 to 24.6.2008	25.6.2008	26.6.2008 to 1.7.2008	2.7.2008 to 3.7.2008	4.7.2008 to 12.7.2008	12.7.2008 to 30.7.2008	31.7.2008 to 30.8.2008
	RM	RM	RM	RM	RM	RM	RM
1st FEA	112148	112148				NO FEA	
2nd FEA		44500	44500	44500			
3rd FEA				7000	7000		
4th FEA							77700
Total Applicable FEA	112148	112148	44500	44500	NIL	NIL	77700

[58] Kuchinta was not notified or informed of the facility, its duration, its commencement and the amount approved. CIMB's witnesses admitted this fact. As reasonable banker CIMB ought to have informed Kuchinta about the status of FEA so that Kuchinta would know if FEA would be available at the time it issued the CIMB cheques. It has always been a duty on the banker towards its customers, to inform the latter on negotiations and/or arrangements made or approved to enable the customers to know what they can and cannot do. This was clearly enunciated in the Federal Court's judgment in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1 FC, (at pp. 14, 15 and 16) (tab 8: Pages: 136, 137 and 138), His Lordship Pajan Singh Gill FCJ (as he then was) stated:

> It is our considered view, that there was an elementary obligation on the part of the 1st respondent, as bankers to inform the 5th appellant as customers of theirs, of the substantial change that they had inserted in the facility agreement. The bank had in this case, executed the facility agreement by shutting its eyes to the obvious fact that they had varied the facility agreement, without the consent of the 5th appellant. It was not in issue that DW1 relied upon and trusted PW2 at the material time. There was also no evidence adduced that PW2 had advised DW1 to seek for independent advice prior to the execution of the facility agreement. It should also be remembered that the "relationship of banker and customer may be said to begin the moment the parties enter into relationships or negotiations which are considered part of the contract, ultimately concluded. The negotiations must be part of the process and lead directly to agreement; negotiations without agreement cannot establish the relationship". (See *Paget's Law of Banking* 9th edn). In the present appeal it was not in dispute that indeed prior to the execution of the facility agreement there was negotiations as evidenced by the working draft and which terms were supposed to be incorporated into the facility agreement. *Hence, even before the execution of the facility agreement there was already a relationship formed between the parties. In such a situation it was therefore de riguer for PW2 to inform DW1 on the variations made or the departure from the agreed terms in the working draft. Thus, the failure to do so in our view amounts to a fundamental breach of duty of care on the part of PW2 and vicariously the 1st respondent* [G:24] (emphasis added).

A *We also find it intriguing why, after having negotiated with the 5th appellant over a considerable period of time and finally agreeing to a working draft, that the respondent would do a complete volte-face, without informing the 5th appellant. Was it done in the pious hope that the 5th appellant may not stumble upon it in the agreement? In this instance, the 5th appellant did just that. If this is the case, then it is conduct that we do not propose to countenance from a financial institution* [D:25] (emphasis added).

What we also find slightly discomfiting is that the trial judge had held that even if the 1st respondent had misrepresented to the 5th appellant that there was no amendment to the facility agreement and the 5th appellant in reliance of this representation signed it, there was no question of impropriety on the part of the 1st respondent as bankers. There was still a duty, the trial judge held on the part of the 5th appellant to scrutinize the agreement, we simply cannot accept this proposition [G:27] (emphasis added).

To our minds if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in an about executing customer's orders. See *Barclays Bank plc v. Quincecare Ltd* [1992] 2 All ER p. 363 [I:28] (emphasis added).

Further, a bank is supposed to treat the customer's mandate at its face value, save in extreme cases. *A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that these was a misuse of authority for the purpose of committing a fraud. See Lipkin Gorman (a firm) v. Karpnale Ltd and Another [1992] 4 All ER 409, Hitherto, there is no question of fraud or misuse of authority on the part of 5th appellant as regards this mandate* [F:32; Line 11] (emphasis added).

[59] In *Malayan Testing Laboratory Sdn Bhd v. Standard Chartered Bank Malaysia Bhd* [2010] 9 CLJ 309 HC (at p. 323) (Tab 3: p. 50), His Lordship Mohd Amin Firdaus JC said:

H In the Singapore Court of Appeal case in Bank of *America National Trust and Savings Association v. Herman Iskandar & Anor* [1998] 2 SLR 265, it was held **that a banker is under a duty to make reasonable attempts to contact a customer to obtain proper instructions from the customer** [F:80] (emphasis added).

I

The court finds that the failure of SCB to make reasonable attempts to contact MTL, a long time customer, had negligently facilitated RK in siphoning the money from the current account of MTL. Please see the said case of *Bank America National Trust and Savings Association* [H:81] (emphasis added).

Having heard the testimonies of the witnesses, both Kuchinta's and CIMB's based on the evaluation of the total evidence adduced the plaintiff, Kuchinta was never made aware of the FEA and its terms and conditions and therefore it would have been impossible for the plaintiff to have known anything on the contentious FEA.

[60] Kuchinta was deprived of the vital information that was required to facilitate the proper management of its subject account. CIMB had a duty as a banker to notify or inform Kuchinta as its customers this information. CIMB had failed to discharge its contractual obligations towards Kuchinta by failing to notify or inform the plaintiff of the FEA.

[61] It was also in evidence that FEA was granted to Kuchinta from time to time and that it was not a continuous exercise. Between the period of 4 July 2008 to 31 July 2008 no FEA was granted to Kuchinta. During this period the PBB and EBB cheques which were deposited on 12 June 2008 were still missing. The first FEA was granted for the period from 19 June 2008 expiring on 25 June 2008 (FEA 1). The validity of the FEA 1 was for seven days for the amount totalling RM112,148 (see B3 at p. 51). There was no issue of insufficient funds being raised by CIMB during this period.

[62] The second FEA was granted for the period of one month from 25 June 2008 expiring on 24 July 2008 for the amount of RM44,500 (FEA 2) (see B3 at p. 52). From 26 June 2008 to 3 July 2008 out of 23 CIMB cheques issued, 12 CRDT CIMB cheques which exceeded RM44,500 of the FEA granted were not dishonoured despite insufficient funds.

[63] The third FEA (FEA 3) granted to Kuchinta was from 2 July 2008 to 12 July 2008 for the sum of RM7,700 (see p. 53 of B3).

[64] As CIMB had honoured some of Kuchinta's CIMB cheques before, it was reasonable for Kuchinta to assume that its seven CIMB's cheques would be honoured by CIMB. However this FEA was not mentioned in the pleadings. The fourth FEA was for the period between 4 July 2008 to 31 July 2008 for RM44,500. It is observed that between 26 June 2008 and 30 July 2008 out of the CIMB 129 CRDT cheques issued by Kuchinta 109 cheques had been cleared from period of FEA 2 and FEA 5 despite the fact that there were insufficient funds in the subject account. Out of these 56 CRDT cheques were honoured during FEA 4 despite the fact that the subject account and insufficient funds and/or negative balance. However the seven cheques as shown in table 2 above were not honoured.

[65] It could be seen that there were many instances as shown above that CIMB had honoured the CIMB cheques notwithstanding that fact that there were insufficient funds and/or in instances the amount of these cheques had exceeded the FEA amount and/or even with negative balance. CIMB had shown by the conduct of its officers, cheques were honoured despite the fact were no sufficient funds and/or negative balance in the subject account or even in situations where the total amount exceeded the amount approved pursuant to the relevant FEA. The FEA that was granted did not cover the whole period until the issue of the missing cheques was resolved. The seven CRDT CIMB cheques which were dishonoured and the 109 cheques which were honoured by CIMB despite both sharing similar characteristics, in that, with end balances overdrawn.

[66] As at 4 July 2008 there were still two cheques missing valued at RM77,700. However CIMB had failed to initiate a fresh FEA to assist Kuchinta despite being aware of the existence of the fourth cheque deposited on 18 June 2008.

[67] The FEAs were for short periods, not continuous, there were gaps between these periods and these FEAs were not based on equivalent missing cheques amount and/or value. CIMB too had not informed Kuchinta of the duration, the amount and the validity period of the FEAs. All information pertaining to the FEA was merely within the knowledge of CIMB alone. In fact Kuchinta had nothing to do with the FEA.

[68] Based on the circumstances of this case I am of the view that Kuchinta was justified in assuming that all CIMB cheques issued by it were within the limits of the uncleared cheque and/or cheques that would be honoured. DW1 and DW3 had also admitted that a temporary arrangement somewhat similar to the overdraft facility would be granted to Kuchinta to assist Kuchinta with its business in the interim whilst, the issue of the uncleared cheques were being sorted out.

[69] As a responsible banker DW3 who was the branch manager of CIMB, ought to have sat down with PW3 to discuss how best CIMB could assist Kuchinta during the times it was facing the financial problem through no fault of Kuchinta. Kuchinta ought to have been told about any temporary arrangements CIMB had in mind whilst waiting for the cheques to be cleared. From the evidence of DW2 and DW3 especially, CIMB as a banker had through these witnesses demonstrated its lackadaisical attitude towards what its witnesses term Kuchinta to be "a valued and long serving corporate client". It had failed to exercise due care in ensuring the services provided to Kuchinta were satisfactory and/or that it had failed to act reasonably as a professional and responsible banker. The acts of CIMB had caused the seven CIMB cheques issued by CIMB to its creditors and staff to be dishonoured by CIMB putting Kuchinta to embarrassment, public humiliation and ridicule. Had CIMB held discussions and communications with Kuchinta and resolved Kuchinta's problems in a more professional and compassionate manner the incidences of its cheques being dishonoured would be minimised. To a small company like Kuchinta, the sum of RM156,648 meant a lot and could be utilised by Kuchinta for the purpose of its business.

Whether The Defendant Had Defamed And/Or Lower Of Estimation Of Kuchinta

[70] Kuchinta had also premised its case against CIMB based on the tort of negligence. Kuchinta claimed that the words "01-refer to drawer" indicated that Kuchinta did not have sufficient funds in the subject account to pay the CIMB cheque it had issued for payment. I am of the view that it is defamatory for CIMB to stamp the words "01-refer to drawer" on the cheques. It was without doubt that the words "01-refer to drawer" on the

cheques must have caused embarrassment to Kuchinta, a company dealing in the business of selling new Proton cars and had in fact lowered Kuchinta's standing in the eyes of the recipient of the cheque. From the facts that I had illustrated in the earlier paragraph if it was not because of the failure of CIMB to clear the cheques Kuchinta would not have been placed in that predicament.

[71] It had been held by His Lordship Hishamudin Yunus J (as His Lordship then was) in the case of *Charles Edward Victor v. Malayan Banking Bhd* [2008] 4 CLJ 59 at pp. 63 & 64, "The wrong and unjustified "refer to drawer" remark on both the cheques must have caused embarrassment to the plaintiff and had lowered his standing in the eyes of Cheong Trading and AIA Co Ltd." The same would apply to Kuchinta in the case at hand.

[72] In *Paget's Law of Banking*, 11th edn. at p. 337-338 quoted by the learned counsel for the plaintiff the learned author states that "Libel is a tort, the making of a defamatory statement in writing or printing which is without justification disparages a man's reputation to a third party. **When a cheque is dishonoured it is usual for the drawee bank to put a note on it indicating the reason for the dishonour**." (emphasis added). Further in *Sim v. Stretch* [1936] 2 All ER 1237 Lord Atkin stated that once these words are used and/or stamped on the cheques it would create the impression in the people's mind that the person who issued the cheques for payment has no money in his account to meet it, and/or that it was not drawn on good faith, or recklessly drawn or there were elements of fraud involved.

[73] In *Top-A Plastic Sdn Bhd & Ors v. Bumiputra Commerce Bank Bhd* [2006] 3 CLJ 460, His Lordship Justice Ramly Ali (as His Lordship then was) in quoting *Paget's Law of Banking*, 9th edn. at p. 240 states that a pay in banker must remember that should one of the customers cheques is returned to the person issuing it, and if the amount of the cheque is smaller, the greater would be the possible damage to credit (*Marzetti v. Williams* [1830] 1 B & Ad 415). Further it was also held in the same case that the credit rating of a company which is actively engaged in trade, like the plaintiff, is as important for their transactions such as mortgages, hire purchase, banking and credit facilities. In the event the banker

had refused to accede to the plaintiff's request to make payment for the cheque issued this in itself is obviously injurious to the plaintiff's credit. If this situation happened then the plaintiff would be able to obtain substantial compensation for the injury to its credit. The words "refer to drawer" and/or "frozen account" had been held to be highly libellous and had the effect as if the plaintiff had been wound up or had gone into liquidation.

[74] In *Kpohraror v. Woolwich Building Society* [1996] 4 All ER 119, "The damage had been held to mean impost disastrousness and serious to the plaintiff as a company and a trader in the present business." This according to the quoted case was because the news about this incident would be spread all over within a short time. Therefore CIMB's action in dishonouring the seven CIMB cheques with the notation "refer to drawer" had been held by Her Ladyship Justice Helliah Mohd Yusof in *Bumiputra Commerce Bank Bhd v. Top-A Plastic Sdn Bhd* [2008] 5 CLJ 737 as "highly libellous and tantamount to mean that the plaintiff had been locked up or had gone into liquidation". Based on the foregoing the plaintiff had made out a case premised on the tort of defamation against CIMB.

Damages

[75] The dishonouring of the CIMB cheques by CIMB would have definitely affected the reputation of Kuchinta as a Proton Edar new car dealer in the eyes of the recipients of those cheques. The endorsement of the words "return to drawer" would have the ordinary and reasonable effect that Kuchinta did not have sufficient funds in its bank account. I had attempted to illustrate in the preceding paragraphs how CIMB was said to have been negligent in not taking the appropriate steps to ensure that the CIMB cheques were honoured and would not attempt to restate the same here. Suffice for me to say that had CIMB exercised its duties diligently and/or with care the incidences of Kuchinta's CIMB cheques being dishonoured would not occur.

[76] In respect of Kuchinta's claim for damages under the tort of defamation I am of the view that it is defamatory for CIMB to stamp the words "refer to drawer" on the seven returned cheques. Given the factual matrix of this case as illustrated above, CIMB should have not rejected Kuchinta's seven CIMB cheques.

Instead it ought to have made alternative arrangements to save the situation and avoid the unnecessary embarrassment and/or humiliation Kuchinta would have to endure. Kuchinta in fact had sufficient funds in the subject account if it had not been for CIMB's blunder. The wrongful and unjustified "refer to drawer" endorsement on the seven returned CIMB cheques must have caused embarrassment to Kuchinta and lowered Kuchinta's estimation in the eyes of the recipients of the cheques. Therefore I am of the view that damages ought to be awarded against CIMB for wrongfully dishonouring Kuchinta's CIMB cheques especially when there would be more than sufficient funds in the subject account had the cheques deposited by Kuchinta were cleared for payment by CIMB. In this case CIMB had not only breached its contractual obligation but also its duty of care to Kuchinta.

[77] It had been held by His Lordship Ramly Ali in *Top-A Plastic Sdn Bhd & Ors v. Bumiputra Commerce Bank Bhd* [2006] 3 CLJ 460 (as His Lordship then was) that in a situation where the bank had wrongfully dishonoured the cheques of the plaintiff where there were more than sufficient funds in the plaintiff's accounts, the damages should be substantial and not nominal.

[78] It is trite that libel and slander is actionable *per se*, Kuchinta need not prove actual damages. In support of this contention I refer to the case of *Ratcliffe v. Evans* [1892] 2 QB 524 at p. 528 where His Lordship Bowen LJ said:

> The law presumes that some damages will flow in the ordinary course of things from the mere invasion of his absolute right to reputation.

[79] In *Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd* [1985] 2 CLJ 390; [1985] CLJ (Rep) 482 HC His Lordship Zakaria Yatim (as he then was) found support from the case of *Gibbons v. Westminster Bank Ltd* [1939] 2 KB 882 where His Lordship Lawrence J held that in cases where the plaintiff is a trader the plaintiff is entitled to recover substantial damages for wrongful dishonour of the plaintiff's bank drafts without even pleading or proving the same. His Lordship Wan Hamzah J had also held in *Ng Cheng Kiat v. Overseas Union Bank* [1984] 1 CLJ 185; [1984] 2 CLJ (Rep) 285, in a scenario where

a plaintiff commenced an action against the bank for wrongfully refusing to pay a cheque that he had drawn, the amount of damages for breach of contract would depend on whether or not the plaintiff is a trader. His Lordship stated that in event the plaintiff is a trader, he is entitled to recover substantial but reasonable damages for injury to his commercial credit without the necessity of pleading and proving any actual damage.

[80] As could be seen in this case even cheque no. 387110 in the sum of RM160 payable to Sutra Timur Enterprising, being payment for printing works had been dishonoured by CIMB. This *per se* had damaged Kuchinta's reputation in the eyes of the recipient, in that, Kuchinta a brand new Proton car dealer did not even have RM160 in its bank account! In an old case of *Marzetti v. Williams* [1830] 1 B & Ad 415 quoted by *Paget's Law of Banking*, 9th edn. at p. 240 it was held that the smaller the cheque, the greater the possible damage to credit.

[81] Based on the foregoing I am of the opinion that the damages of RM50,000 for breach of contractual obligations, RM50,000 for breach of duty of care and RM80,000 for the tort of libel respectively are reasonable and justified. However I had refused to allow aggravated and exemplary damages prayed for as the facts of this case did not merit and did not fall within the principles these damages ought to be awarded.

Answers To The Issues Posed

[82] The broad issues:

(a) Whether CIMB had failed and/or neglected to credit into the subject account the four banker's cheques with the value of RM156,648 within the timeline stipulated by CIMB and the banking industry;
- To be answered in the affirmative.

(b) Whether CIMB's failure and/or negligence in ensuring the four banker's cheques were credited into the subject account within the timeline stipulated by CIMB and the banking industry tantamount to breach of contract between a banker and its customer;
- To be answered in the affirmative.

(c) Whether CIMB's failure and/or negligence in ensuring the four banker's cheques were cleared into the subject account within the stipulated timeline by CIMB and the banking industry tantamount to breach of duty of care by the banker towards its customer;
- To be answered in the affirmative.

(d) Whether the "return cheque advice" issued by the defendant to Sutra Timur Enterprise specifying the reason for the return of the CIMB cheque "01-refer to drawer" was wrong, without justification and/or truth, and whether it had defamed the plaintiff and/or lowered the estimation of Kuchinta in the eyes of the recipient of the dishonoured cheque.
- To be answered in the affirmative.

(e) Whether the failure and/or the breach of CIMB's duty to ensure that the seven CIMB cheques were honoured and cleared for payment had embarrassed Kuchinta and/or had lowered Kuchinta's estimation in the eyes of the recipients of the cheques.
- To be answered in the affirmative.

(f) Whether CIMB had failed to honour the seven of CIMB cheques issued to its creditors and/or staff.
- To be answered in the affirmative.

(g) Whether the failure of CIMB to fulfil its contractual obligations and/or its duty of care to Kuchinta, its customer had caused Kuchinta to suffer loss and damages.
- To be answered in the affirmative.

Conclusion

[83] On the totality of the evidence adduced by the plaintiff through its witnesses both testimonial and documentary and having evaluated the evidence of the plaintiff against the evidence of the defendant, I am satisfied that the plaintiff had discharged the onus of establishing its pleaded case against the defendant on the balance of probabilities. Hence, the plaintiff's claim against the defendant is allowed with costs. After hearing a short submission on costs by the respective learned counsels, I awarded costs of

RM40,000 to the plaintiff. In arriving at the above decision, I had carefully considered the evidence adduced by the plaintiff and the defendant both testimonials as well as documentary, the submissions by both the respective learned counsels as well as authorities tendered in support of their respective submissions.

[84] Lastly I would like to express my sincere appreciation to both learned counsels who had diligently and professionally conducted the trial before me and assisted me with their well researched submissions to enable me to decide this case.